Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160(c) From Application Of Sections 251(c)(3), (4) and (6) In New-Build, Multi-Premises Developments	)	WC Docket No. 03-220

COMMENTS OF AT&T CORP.

David L. Lawson
Paul J. Zidlicky
Joseph R. Palmore
Sidley Austin Brown & Wood LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000

Leonard J. Cali
Lawrence J. Lafaro
Stephen C. Garavito
AT&T Corp.
One AT&T Way
Bedminster, New Jersey 07921
(908) 532-1845

Counsel for AT&T Corp.

November 10, 2003

Table of Contents

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160(c) From Application Of Sections 251(c)(3), (4) and (6) In New-Build, Multi-Premises Developments	)	WC Docket No. 03-220

COMMENTS OF AT&T CORP.

Pursuant to the Commission's Notice,[1] AT&T Corp. ("AT&T") hereby respectfully submits these comments in opposition to the October 8, 2003 Petition for Forbearance filed by BellSouth Telecommunications, Inc. ("BellSouth").

INTRODUCTION AND SUMMARY

BellSouth's forbearance petition, which asks the Commission "to forbear from applying sections 251(c)(3), (4) and (6) to the BellSouth Facilities used exclusively to serve New-Build, Multi-Premise[s] Developments and to the services provided over such facilities to the end users located in such developments," Petition at 1, is both premature and meritless. As a matter of law, forbearance from the requirements of Section 251(c) is not permissible where, as

[1] *See* Public Notice, DA 03-3146 (Oct. 9, 2003).

here, all its "requirements" have not been "fully implemented."[2] Because BellSouth does not and cannot show that there is tangible, widespread local competition in its service areas, Section 251(c) has not been "fully implemented" and forbearance is prohibited. In any event, the Commission only months ago rejected the core premise behind BellSouth's petition, *i.e.*, that CLECs and ILECs are on equal footing when competing for customers in new-build multi-premises developments.[3] It should come as little surprise therefore that BellSouth fails to satisfy *any* of the requirements for forbearance under Section 10(a) of the Communications Act, because it cannot show that forbearance would be good for consumers or competition, or is in the public interest.[4]

The most obvious flaw in BellSouth's petition for forbearance under Section 10(a) is its fatal prematurity. A separate statutory limitation, Section 10(d), bars the Commission from even applying the Section 10(a) forbearance criteria to the rules targeted by BellSouth until the "requirements" of Sections 251(c) and 271 "have been fully implemented." BellSouth's unsupported and cursory argument that Sections 251(c) and 271 have, indeed, been "fully implemented" in its service area because it has received authorization to provide inter-LATA service there has been squarely rejected by the Commission. In a decision reached after BellSouth filed its petition, the Commission held that the grant of authority to provide interLATA service does *not* satisfy the "fully implemented" requirement with respect to *all* of

---

[2] Communications Act Section 10(d), 47 U.S.C. § 160(d).

[3] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers*, CC Docket No. 01-338, ¶¶ 273-97 (rel. Aug. 21, 2003) ("*Triennial Review Order*"); *id.* App. B, p. 13 (rules).

[4] 47 U.S.C. § 160(a).

the provisions of Sections 251(c) and 271.[5] As reflected in the Commission's decision, the "fully implemented" requirement is much more demanding than BellSouth contends. The term's plain meaning demands a finding that the statutory requirements have been "carried into effect" "totally or completely," an impossibility in present circumstances, given ongoing development of and challenges to the relevant requirements, state commissions' ongoing efforts to implement Section 251(c), and, most pertinently, the developing state of still-nascent local competition. Reading Section 10(d) to permit repeal of the core regulation that makes intramodal competition possible long before ubiquitous intermodal competition – the only development that could make that regulation unnecessary – would be wholly illogical.

Even if BellSouth could somehow overcome the Section 10(d) hurdle, the Commission should reject its contentions for the simple reason that it has already done so. During the Triennial Review proceedings, SBC made the very same argument BellSouth advances here, *i.e.*, that the purportedly "equal" footing of ILECs and CLECs when competing for customers in new developments makes it unnecessary for ILECs to provide unbundled access to their network elements in these settings. In rejecting this argument, the Commission took note of the various barriers to entry that prevent CLECs from providing effective facilities-based competition to ILECs (with the narrow exception, in the Commission's view, of fiber-to-the-home) and maintained its unbundling requirements in new developments as well as old. It should do so here as well, for BellSouth plainly cannot satisfy the section 10(a) forbearance requirements, which understandably focus on the protection of consumers and competition. BellSouth could not hope

---

[5] *See* Memorandum Opinion and Order, *Petition of Verizon for Forbearance*, CC Docket No. 96-149 (rel. Nov. 4, 2003).

to show that forbearance would serve either goal.

It is telling in this regard that the Petition never provides a precise definition of the "New-Build, Multi-Premises Developments" at the center of its claim for forbearance. Instead, the petition describes them generally to include all "newly constructed, multi-subscriber properties . . . where the improvements, including the telecommunications infrastructure, will be new construction." Petition at 2. This definition is crystal clear in only one respect: in its remarkable breadth. It would include a two-house "development" with new "telecommunications infrastructure," such as an incremental addition to a loop already serving the neighbors of the two-house development. In fact, BellSouth acknowledges that its definition is broad enough to comprise a "*majority*" of the housing starts in its service area. *Id.* (emphasis added). BellSouth is clearly seeking relief with respect to a category of developments much broader than true "greenfields" in which previously vacant land becomes home to a new development large enough to support its own switch. *See* Declaration of Anthony J. Giovannucci ¶ 18 (Attachment A).

Given the breadth of its definition of New-Build, Multi-Premises developments, BellSouth would be able to serve the vast majority of these new customers with incremental extensions of its existing network. *See id.* ¶¶ 20-25. It is therefore not the case, as the Petition claims, that BellSouth has no advantage over CLECs when competing for these customers. BellSouth's argument simply ignores that it possesses bottleneck control over an entire communications infrastructure anterior to the incremental infrastructure additions necessary to serve the large majority of these developments.

BellSouth's proposal rests on a second faulty premise as well: that CLECs face no barriers in securing access to New-Build, Multi-Premises Developments. In fact, developers

frequently refuse to contract with CLECs, or, if they do, often subject them to discriminatory requirements. *See id.* ¶¶ 39-45. Therefore, even in the relatively tiny category of true "greenfield" developments, the ILECs have considerable competitive advantages that make forbearance inappropriate.

For these reasons, BellSouth cannot satisfy any of the statutory requirements for forbearance. Most obviously, it would hardly "enhance competition among providers of telecommunications services," 47 U.S.C. § 160(b), to wipe out what are, and will remain for the foreseeable future, the *only* means of effective competition for residents of New-Build, Multi-Premises Developments. For the same reasons, BellSouth's proposal could not conceivably "ensure that the charges . . . are just and reasonable and are not unjustly or unreasonably discriminatory," 47 U.S.C. § 160(a)(1), given that Congress has directed that the *only* just and reasonable rates in this context are cost-based rates, *see id.* § 252(d)(1) ("Determinations by a State commission of the just and reasonable rate[s] . . . shall be . . . based on the cost" of providing requested elements). This is so because the Petition explicitly contemplates that BellSouth and other ILECs would provide network elements to CLECs at rates that are far above cost. Petition at 1 n.2; *see infra* Section III A 4.

ARGUMENT

I. BELLSOUTH'S PETITION IS PREMATURE AND CANNOT BE GRANTED, BECAUSE SECTIONS 251 AND 271 ARE NOT "FULLY IMPLEMENTED."

BellSouth's Petition must be dismissed as premature. Section 10(d) places an explicit "[l]imitation" on the remainder of Section 10, providing that the "Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those

requirements have been fully implemented."[6] The Commission considers Section 10(d) as a "threshold matter" in forbearance proceedings, and a petitioner's failure to satisfy its requirements mandates denial of the Petition without consideration of its merits.[7] In this case, because Sections 251(c) and 271 have not been fully implemented in any of the states in BellSouth's service area, the Commission has no authority to grant a request that it forbear from applying any of the requirements of Section 251(c).

BellSouth seeks to dismiss this threshold problem only in a single paragraph, arguing that "[t]he Commission has previously determined that BellSouth has fully implemented the requirements of section 251, 252 and 271 in its entire nine (9) state service territory" and that "[e]ach of the 9 relevant state commissions has implemented the statutes and Commission regulations in state arbitrations and other proceedings."[8] BellSouth argues that the Commission's determination that a BOC has satisfied Section 271's competitive checklist such that it can offer interLATA service constitutes a determination that *all* of Sections 251(c) and 271 have been "fully implemented" and that forbearance from the requirements of Section 251(c) is therefore permissible.

The Commission has soundly rejected this argument. *See Petition of Verizon for Forbearance*, CC Docket No. 96-149 (Nov. 4, 2003). In a recent decision denying a petition for forbearance filed by Verizon, the Commission decided that "the grant of section 271 authority in a state" does *not* mean that all the requirements of Section 271 (much less those of Section

---

[6] 47 U.S.C. § 160(d).

[7] *Petition of Verizon for Forbearance* at ¶¶ 5, 9.

[8] Petition at 7-8.

251(c)) have been "fully implemented." *See id.* ¶¶ 6-7.

As reflected by the Commission's decision, BellSouth's strained reading of Section 10(d) is unsupportable and would lead to anticompetitive and counterintuitive results that run headlong against the central goals of the 1996 Act. Under BellSouth's construction of Section 10(d), the Commission could, the very *moment* after granting BellSouth long distance authority premised on findings that BellSouth's continuing compliance with Sections 251(c) and 271 would open local markets up to the *possibility* of competition, put an end to that possibility and return to the pre-Act "unregulated world" in which the BOCs enjoyed an "almost insurmountable competitive advantage." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 490-91 (2002).

BellSouth's argument fundamentally misunderstands the scope of the Section 271 process. Section 271(d)(3)(A)(i) requires only that the Commission find that a BOC has satisfied a competitive checklist with regard to a single facilities-based interconnection agreement. It does *not* require a universal finding that Sections 251(c) and 271 have themselves been fully implemented by all relevant parties – the state commissions, the BOCs, competing carriers, the Commission itself and federal courts – as Section 10(d) requires. For example, a finding that a BOC has satisfied the checklist for a particular interconnection agreement does not constitute a finding that the BOC will, as required by Section 271(d)(3)(B), operate in accordance with the requirements of Section 272. Nor does it require a finding, consistent with Section 251(c)'s objectives, that enduring local competition has *in fact* developed. Rather, it is a determination that the market is sufficiently open to make a prediction that price-constraining competition *will* eventually take root, not a determination that such competition is a present reality.

The limited scope of the Section 271 finding is highlighted by the very same Section 271 decisions in which BellSouth claims the Commission has found it to have "fully implemented"

Sections 251(c) and 271. Petition at 7 & n.8. In each of those decisions, the Commission expressly stated that it would "closely monitor" BellSouth's performance and would "stand ready to exercise [its] various statutory enforcement powers quickly and decisively in appropriate circumstances to ensure that the local market remains open."[9] The Commission has also explicitly stated that "obtaining section 271 authorization is *not* the end of the road" and that the "critically important power" in Section 271(d)(6) "underscores Congress's concern that BOCs *continue to comply* with the statute."[10] The Commission could not have made these pledges in its Section 271 orders if it were simultaneously finding that Sections 251(c) and 271 have themselves been fully implemented.

Section 10(d) requires a finding that "the requirements of section 251(c) [and] 271 . . . have been fully implemented," *i.e.*, at a minimum that there is ubiquitous availability of cost-based wholesale alternatives to incumbent carriers' bottleneck facilities, such that the incumbent carriers would no longer be deemed dominant in local services markets. The word "implement" means "to carry into effect, fulfill, accomplish" and to "give practical effect to." And the word "fully" means "totally or completely." Webster's New World Dictionary. Sections 251(c) and

---

[9] Memorandum Opinion and Order, *Joint Application of BellSouth Corp., BellSouth Telecomms., Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Servs. in Georgia and Louisiana*, 17 FCC Rcd. 9018, ¶ 307 (2002); Memorandum Opinion and Order, *Joint Application by BellSouth Corp., BellSouth Telecomms., Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Servs. in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, 17 FCC Rcd. 17,595, ¶ 303 (2002); Memorandum Opinion and Order, *Application by BellSouth Corp., BellSouth Telecomms., Inc. and BellSouth Long Distance, Inc. for Authorization to Provide In-Region, InterLATA Servs. in Florida and Tennessee*, 17 FCC Rcd. 25,828, ¶ 182 (rel. Dec. 19, 2002).

[10] Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In Region, InterLATA Servs. in the State of N.Y.*, 15 FCC Rcd. 3953 ¶¶ 448, 453 (1999) (emphases added).

271 will be "fully implemented," therefore, when a practical effect results: namely, when ubiquitous and durable local competition *actually exists* and the incumbents no longer control bottleneck facilities. *Cf. Verizon,* 535 U.S. at 532, 538 (upholding Commission rules that interpret the "statutory dut[ies]" of Section 251(c) to "reach the result the statute requires" and thereby "get[] a practical result").

The requirements of sections 251(c) and 271 are not fully implemented, according to the plain meaning of those terms, where, as is the case today, (i) final, unchallenged rules that implement the duties and obligations of Section 251(c) are not currently in effect; (ii) the key cost principles that are used to determine prices for network elements and interconnection required to be provided under those sections are to be the subject of an upcoming Commission rulemaking; (iii) state commissions have yet to apply and "implement" any new rules (and, indeed, have not even finished implementing the prior rules); (iv) none of these new rules or pricing principles have been implemented in interconnection agreements; and (v) local competition remains nascent. State commissions' varied regulatory activity confirms that Section 10(d) is not satisfied: what are the State commissions and parties before them doing, if not "implementing" Section 251(c)'s requirements?

In contrast to Section 271(d)(3)(A)(i), Section 10(d) is intended to ensure that the very structure of local markets has changed and that they remain open *permanently* by limiting the Commission's ability even to *consider* requests for forbearance from any of the requirements of Sections 251(c) and 271, which the Commission has properly found to be the very "cornerstones

of the framework Congress established in the 1996 Act to open local markets to competition."[11] There has not been, and could not be, any finding that the requirements of Sections 251(c) and 271 have been fully implemented in BellSouth's service area, and the Petition must, accordingly, be dismissed as premature.

II. THE COMMISSION HAS ALREADY REJECTED THE RATIONALE BEHIND BELLSOUTH'S PETITION.

Even if BellSouth could overcome the obstacle posed by Section 10(d), its Petition would still have to be rejected. In fact, the Commission has already rejected the precise argument undergirding the Petition, *i.e.*, that there is no continuing need for Section 251(c) obligations to protect consumers that live in "new build" multi-premises developments. That analysis applies equally here.

In its Notice of Proposed Rulemaking that initiated the Triennial Review proceedings, the Commission asked whether it "should . . . exempt from an unbundling obligation any facilities that an incumbent LEC constructs after a set point in time."[12] SBC urged the Commission to answer this question in the affirmative, deploying the very same arguments proffered by

---

[11]Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 FCC Rcd. 24012, ¶ 73 (1998). In this regard, the full implementation language of Section 10(d) is analogous to the standard for vacatur of an injunction that is intended to serve a particular purpose. In that context, the courts look to see if the purpose of the injunction has been achieved, and will only vacate the injunction if it has in fact been achieved and there is little danger of relapse. For example, in cases involving unlawful restraints on trade, the Supreme Court said that a decree "may not be changed . . . if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968). Likewise, courts have refused to permit an injunction to be vacated if the party subject to the injunction was likely to "return to its former ways" should the injunctive decree be lifted. *Board of Educ. v. Dowell*, 498 U.S. 237, 247 (1991).

[12] Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers*, 16 FCC Rcd 22781, ¶ 24 (2001).

BellSouth here:

> [T]he Commission should find that facilities deployed to serve new residential and commercial areas are not subject to unbundling. In this and other "green field" scenarios, the development is not being served by any existing facilities and will necessarily require an investment in new infrastructure. Frequently, the developer will solicit competitive bids for building out the necessary facilities. Indeed, several CLECs have adopted a strategy dedicated to just these circumstances. When an incumbent's unbundling obligations extend to such green field developments, the business analysis of whether the incumbent can profitably serve that development is necessarily skewed. In addition to the cost of building out and maintaining new facilities, an incumbent's bid must discount the expected revenue stream by the inevitable loss of customers to CLECs purchasing UNEs at TELRIC rates. CLECs will undertake a similarly distorted analysis, all to the detriment of consumers. For instead of simply calculating whether it can serve the development more efficiently than the incumbent, the CLEC will weigh that determination against profits that it could earn, and the risk that it can eliminate, by piggybacking on the incumbent's investment.[13]

Like SBC, BellSouth bases its argument on the assumption that ILECs have no competitive advantage over CLECs when competing for business in new developments. In support of this assumption, SBC relied on the contention that greenfield developers "solicit competitive bids for building out the necessary facilities," SBC Comments at 19, while BellSouth echoed that developers "engage in a competitive negotiation process (whether formal or informal) with communications providers," Petition at 3.

Moreover, both BOCs relied on the same incentive-based arguments in opposing unbundling obligations in new developments. Specifically, SBC complained that "unbundling obligations" can "ske[w]" an ILEC's decision about whether to serve new developments because of its awareness that competing providers may be able to access its facilities. SBC Comments at

---

[13] Comments of SBC Communications Inc., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers*, CC Docket No. 01-338, at 19 (Apr. 5, 2002) (citation omitted) ("SBC Comments").

19. Similarly, BellSouth complains that Section 251(c) "reduce[s] the incumbent LEC's incentive and ability to compete" for this business "because other providers can lease the discrete elements of any . . . facilities that the incumbent LEC installs or obtain the retail telecommunications services of the incumbent LEC at government-mandated rates." Petition at 5. Finally, both BOCs complained that unbundling obligations in new developments inappropriately dampen CLECs' incentives to use their own equipment: SBC referred to this phenomenon as "piggybacking on the incumbent's investment," SBC Comments at 19, while BellSouth calls it the ILECs' "'safety net,'" Petition at 5.

In determining that it would lift unbundling requirements only for fiber to the home ("FTTH") loops in new-build situations, the Commission in the *Triennial Review Order* soundly rejected SBC's broad-brush argument.[14] Specifically, because of "the steep economic barriers associated with alternative loop deployment that are compounded by various identified operational issues," the Commission determined that it would continue to require unbundling of "all copper or hybrid copper/fiber facilities."[15]

Ironically, BellSouth argues that this square rejection by the Commission of its theory actually supports its forbearance argument. BellSouth claims that "[i]n reaching its decision regarding FTTH, the Commission concluded that incumbent LECs lack any first-mover advantages in greenfield scenarios."[16] The Commission came to this conclusion with respect to FTTH, however, because it found that CLECs "are currently leading the overall deployment of

---

[14] *Triennial Review Order* ¶¶ 273-97; *id.* App. B, p. 13 (rules).

[15] *Triennial Review Order* ¶ 199.

[16] Petition at 4.

FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation."[17] By contrast, the Commission stated that "[n]o party seriously asserts that competitive LECs are self-deploying copper loops to provide telecommunications services to the mass market."[18]

It was this critical distinction that led the Commission to dispense with unbundling *only* with respect to all-fiber mass market loops. In fact, the Commission reinforced the distinction when it qualified its finding with respect to new FTTH deployments by making clear that when an ILEC "overbuild[s]" FTTH on an existing copper network, CLECs "can continue to have unbundled access to existing copper facilities."[19] Just as it did mere months ago, the Commission should again decline the ILECs' attempt to close off the avenues to competition provided by Section 251(c).

Moreover, granting BellSouth's request for forbearance would directly contradict the Commission's well thought-out finding that CLECs would be impaired without access to inside wire subloops. Specifically, the Commission found that access to inside wire subloops was essential to CLEC deployment of their own loop infrastructure:

> Without unbundled access to the inside wire subloop, a facilities-based competitor could conceivably construct an entire facilities-based network with no reliance whatsoever on the incumbent LEC's network elements, and still be unable to reach an end user in a multiunit premises or campus-type environment. [20]

Indeed, the Commission recognized the critical importance of access to inside wire subloops

---

[17] *Triennial Review Order* ¶ 275.

[18] *Id.* ¶ 226.

[19] *Id.* ¶ 279; *see also id.* ¶ 277.

when it declined to impose any of the loop capacity limitations on inside wire subloops. The Commission distinguished between loop elements generally and inside wire subloops stating:

> [i]n a building where unbundled DS3 loops from the incumbent LEC are no longer required because such capacity has met the self-provisioning or available wholesale alternative trigger, the availability of such capacity *to* the building does not correlate to the ability to take that capacity *up through the* building to the floor or suite of a customer to be served.[21]

BellSouth's Petition requests that the Commission ignore these important findings, made only a few months ago.

For the same reasons, it plainly would not be appropriate to forbear from unbundling requirements for multi-unit premises that include enterprise customers. BellSouth's broad definition of MDUs sweeps into its proposal untold numbers of enterprise customers. Specifically, BellSouth seeks to eliminate unbundling requirements from such vague and undefined categories like new "mixed use developments," "multi-tenant commercial buildings, "malls," "industrial parks," and any "similar developments" that have some form of "new construction." Pet. at 2.

In the *Triennial Review Order*, the Commission made clear and unambiguous distinctions between loops that serve the mass market and loops used to serve enterprise customers.[22] For example, the Commission found CLECs were impaired without unbundled access to DS3 loops for enterprise customers and required ILECs to unbundle such loops. *Id.* ¶¶ 320-24. Further, the

---

(. . . continued)

[20] *Triennial Review Order* ¶ 354.

[21] *Triennial Review Order*, ¶ 347 n.1041.

Commission made clear that even though DS1 level loops could be provided to both types of customers, *id.* ¶ 326, "the unbundling obligation associated with DS1 loops" to serve enterprise customers applies "regardless of the technology used to provide such loops." *Id.* ¶ 325, n.956. CLECs may therefore obtain access to DS1 and DS3 loops to serve enterprise customers "without restriction." *Id.* Accordingly, when BellSouth deploys a loop to an enterprise customer, BellSouth must unbundle that loop, whether the customer is in a multi-tenant building or a "mixed use development" of stand-alone buildings that also include residential customers.[23]

Having just made these determinations that CLECs were impaired in serving these enterprise customers, it would be plainly unlawful and improper for the Commission to turn around and immediately forbear from the requirement that ILECs provide such unbundled access. BellSouth's Petition to forbear from unbundling of facilities used to serve mixed-use developments and other enterprise customer locations would obliterate the clear distinctions between enterprise and mass market loops and would be severely anticompetitive.[24]

III. THE PETITION DOES NOT COMPLY WITH THE SECTION 10(a) FORBEARANCE CRITERIA.

Section 10(a) requires a proponent of forbearance to make three "conjunctive" showings,

---

(. . . continued)

[22] *Compare Triennial Review Order* ¶¶ 211-97 *with id.* ¶¶ 298-342.

[23] *Triennial Review Order* ¶ 347 (recognizing that barriers faced by CLECs in accessing customers in multi-unit premises extends "to all customers residing therein").

[24] In addition, BellSouth's Petition makes absolutely no effort to demonstrate that the requirements for Section 10 have been met for mixed-use and other enterprise customer locations. Accordingly, to the extent that BellSouth's request for forbearance extends to mixed-use or enterprise customer locations, it plainly fails to satisfy the statutory requirements for forbearance.

and the Commission must "deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied." *CTIA v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003). First, the proponent of forbearance must show that enforcement of the specific regulations at issue "is not necessary to ensure that the charges . . . are just and reasonable and are not unjustly or unreasonably discriminatory." 47 U.S.C. § 160(a)(1). Second, it must show that enforcement of those regulations "is not necessary for the protection of consumers." *Id.* § 160(a)(2). And, third, it must show that non-enforcement of those regulations "is consistent with the public interest," *id.*, § 160(a)(3), and, in particular, that such non-enforcement will "promote competitive market conditions" and "enhance competition among providers of telecommunications services." *Id.* § 160(b).

BellSouth's Petition cannot satisfy any of these criteria. The fundamental flaw in its Petition is the assumption that CLECs and ILECs are similarly situated when competing for customers in New-Build, Multi-Premises Developments. Given the breadth of the category of developments at issue in BellSouth's Petition and, in particular, the fact that it comprises much more than true "greenfields," ILECs are uniquely situated to serve these customers through incremental expansions of their existing networks. *See* Giovannucci Decl. ¶¶ 18-25. Without cost-based access to *those* ILEC facilities, CLECs' theoretical ability to lay their own wire in the new developments is worthless. Moreover, experience shows that developers often refuse to provide access to CLECs or do so only on discriminatory terms, *see id.* ¶¶ 39-45, and that ILECs and CLECs therefore do not stand on equal footing even in true "greenfield" situations.

For these reasons, it would hardly "enhance competition among providers of telecommunications services," 47 U.S.C. § 160(b), to give in to an incumbent monopolist's demand that the Commission wipe out the *only* realistic means of local phone competition for

residents of New-Build, Multi-Premises Developments. Moreover, the Commission has squarely held that a forbearance request must be denied if "forbearance would be likely to raise prices for interconnection and UNEs, (particularly those that may constitute bottleneck facilities), inputs competitors must purchase from incumbent LECs in order to provide competitive local exchange service."[25] Thus, the Commission denied requests for forbearance of dominant LEC depreciation requirements, because the "result of forbearance" would "be higher costs for competitive LECs which could impair their ability to enter and compete in local markets" and would "adversely affect competition by raising input prices that competitors pay," thereby "retard[ing] competition."[26] The case against BellSouth's Petition is even stronger, for "raising prices for interconnection and UNEs" is not just a potential side effect of the requested forbearance, but rather its very purpose.

Finally, a request that seeks "the forbearance of dominant carrier regulation under Section 10" demands "a painstaking analysis of market conditions" supported by empirical evidence, not just unverified assertions. *WorldCom, Inc.* v. *FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001); *AT&T Corp.* v. *FCC*, 236 F.3d 729, 735-37 (D.C. Cir. 2001). The Commission cannot, as BellSouth would have it, simply "assume that, absent" the regulation at issue, "market conditions or any other factor will adequately ensure that charges . . . are just and reasonable and are not

---

[25] Memorandum Opinion and Order, *1998 Biennial Regulatory Review - Review of Depreciation Requirements for Incumbent Local Exch. Carriers*, 15 FCC Rcd. 242, ¶¶ 54, 63, 68 (1999) ("*1998 Biennial Review Depreciation Requirements*").

[26] *Id.*

unjustly or unreasonably discriminatory."[27] BellSouth's failure to introduce such evidence provides independent grounds for denial of its Petition.

A. The Provisions of Section 251(c) Are Necessary To Ensure That Charges To Residents of New-Build, Multi-Premises Developments Are Just, Reasonable And Nondiscriminatory.

BellSouth cannot show that enforcement of the provisions of Section 251(c) "is not necessary to ensure that the charges . . . are just and reasonable and are not unjustly or unreasonably discriminatory." 47 U.S.C. § 160(a)(1). In fact, forbearance would lead to unreasonable prices and practices because it would squelch competition in New-Build, Multi-Development Premises. Without the competition avenues provided by § 251(c), CLECs will simply not be able to provide service to these developments, thus ensuring monopoly control.

1. BellSouth Ignores Its Bottleneck Control Over The Entire Network Of Transmission Facilities.

The overbreadth of the relief BellSouth seeks is striking. Although much of its argument misleadingly focuses on true "greenfield" situations, *i.e.*, where the *entire* telecommunications plant, including a switch, must be built from scratch, BellSouth does not limit its definition of New-Build, Multi-Premises Developments to this relatively tiny group of developments. In fact, the Petition defines New-Build, Multi-Premises Developments broadly to include *all* "single-family home subdivisions . . . where the . . . telecommunications infrastructure[] will be new construction," without providing any definition of the key term "telecommunications infrastructure." Petition at 2. This category of developments would apparently range from a true "greenfield," *e.g.*, a massive new development large enough to support its own switch and built

---

[27] Fifth Memorandum and Order, *1998 Biennial Regulatory Review - Review of ARMIS Reporting Requirements*, 14 FCC Rcd. 11443, ¶ 32 (1999).

on previously vacant land, all the way down to a two-house development built in the middle of an established neighborhood in which it is necessary only to make incremental additions to an existing loop. Indeed, BellSouth's definition is so broad that a "*majority*" of the "*490,000* new housing starts within BellSouth's 9 state region during 2003" falls within it. Petition at 2 (emphases added).

Wiping out BellSouth's Section 251(c) obligations when providing service to this massive category of customers – the large majority of whom are not part of true "greenfield" developments – would enable it to leverage its ubiquitous local network to the competitive disadvantage of the CLECs. *See* Giovannucci Decl. ¶¶ 18-25. BellSouth's Petition fails to acknowledge that there is a loop plant anterior to the incremental addition necessary to provide service to most new developments. In virtually all cases, the ILECs will therefore be in a vastly better position to serve new developments because of their huge scale and scope and their ability to incrementally extend their existing networks. *See id.*

Simply deploying loops is not sufficient to offer telecommunications services to customers. Those loops must be connected to switches (either using feeder/distribution plant or local fiber rings). As the Supreme Court has recognized, a "newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's *entire existing network*." *Verizon*, 535 U.S. at 490 (emphasis added). Thus, even if CLECs could place loops in the ground at the same cost as ILECs, they still remain at a

significant cost disadvantage because the ILECs' ubiquitous networks enable them to build much less outside plant to connect the new developments to the local switches that provide service.[28]

Because of its ubiquitous local network, BellSouth is required to make only incremental extensions in order to serve most of the so-called "new" builds discussed in its Petition. *See* Giovannucci Decl. ¶¶ 18-25. In nearly all cases, the loop plant extended to the build will tie back into BellSouth's existing distribution network, or, in the case of larger developments, into existing feeder networks. *See id.* ¶ 20. Calls will then be carried over common facilities that transport BellSouth's existing, enormous demand. Incremental expansion of this kind permits BellSouth to lower costs through economies of scale. *See id.*

In many instances, BellSouth's ability incrementally to expand its existing network to serve "new" developments is materially furthered by its previous deployment of dark fiber. *See id.* ¶ 21. As with copper-based plant, ILECs build their fiber loops with substantial excess capacity, because it is much cheaper to deploy such excess capacity during initial construction than to add it later. *See id.* ¶ 9. Indeed, the cost of deploying additional fiber-based capacity is

[28] The fallacy of BellSouth's position is illustrated by a hypothetical analogy. Imagine that an incumbent railroad owned all of the tracks in a state and that other railroads could compete only because that railroad was required to provide them access to its tracks at cost. Imagine further that the incumbent argued that it should not be required to provide such cost-based access to its competitors when they make deliveries to new factories, on the theory that they can lay track to the new facility just as easily as the incumbent. The incumbent railroad's position would obviously be untenable. Without access to the entire network of tracks necessary to make deliveries, the competitor's "access" to the new factory on its own tracks is worthless. The same is true here: without access to BellSouth's bottleneck facilities *anterior* to the final connection, CLECs will be unable to compete.

minimal compared to monetary and time costs of new construction.[29] Where dark fiber exists, adding "new" capacity requires only that optical terminating equipment be placed at each end of the facility. *See id.* ¶ 10. And even where no dark fiber exists, it is generally feasible to upgrade the existing terminal electronics to significantly increase the ILEC's capacity (for example, from an OC-3 to an OC-12 or OC-48). *See id.* Because the ILEC typically has *already* deployed excess fiber capacity, it can match any service the CLEC wishes to provide by performing comparatively inexpensive upgrades to the electronics associated with its existing facilities.

Additionally, BellSouth has significant competitive advantages over CLECs because of its ownership of rights-of-way. *See id.* ¶¶ 27-34. Even when it does have to deploy new facilities to extend service to a development, BellSouth will be able to do so using these existing rights-of-way. *See id.* This permits BellSouth to gain economies of scale and scope that the CLECs cannot hope to achieve, and also helps it overcome the serious sunk cost entry barriers identified by the Commission in the *Triennial Review Order*.[30] A CLEC, on the other hand, faces a completely different situation. It generally cannot rely on existing facilities, rights-of-

---

[29] The Commission's Synthesis model shows that the average incremental cost of a fiber strand is about $0.02 to $0.03 per foot.

[30] As the Commission noted, deploying telecommunications equipment "requires a great deal of capital for equipment, network construction, and operating costs while customers are gradually added to an entrant's network." *Triennial Review Order*, ¶ 86. These massive capital costs are "exacerbated by the length of time – months or years – that it can take before investments start to turn a profit owing to the pace of construction . . ., and the need to invest in a great deal of equipment before serving the first customer." *Id.* Moreover, the necessary equipment carries "very high fixed costs, many of which are sunk," most obviously "wireline transmission facilities" that "cannot be moved, even if customer demand patterns change." *Id.* Finally, "producing telecommunications services requires very substantial economies of scale and scope." *Id.*

way, or conduit. *See* Giovannucci Decl. ¶ 27. Rather, it must start from scratch to construct the loop, which will inevitably take many months of pre-construction while the CLEC negotiates and secures (if possible) the necessary rights-of-way and construction permits from the municipality and negotiates terms of building access from the landlord.[31] Many municipalities seek to impose exorbitant fees and other onerous conditions on CLECs that are seeking rights-of-way. *See id.* ¶¶ 28-30. Customers typically do not wish to wait until the CLEC can build the necessary facilities, and they usually therefore choose the ILEC instead. *See id.*, ¶¶ 31-34 (discussing delays associated with securing rights-of-way).

All of this, of course, assumes that a CLEC has in place a switch capable of serving the new customers. If it does not, it would need to incur the considerable costs and delays of deploying one. Many subdivision developers are unlikely to take the chance that the switch can be deployed and connected to the loops in time, particularly when there is an established alternative (the ILEC) that can provide service almost instantly. *See id.*, ¶ 31. Relatedly, only a handful of new developments generate sufficient traffic to justify independently their own switch. *See id.*, ¶ 24. Thus, to achieve switching costs comparable to the ILEC, the CLEC must not only be able to serve the new development, but also surrounding areas. *See id.* Limitations on loop-transport combinations and NGDLC loops, and the inability to obtain coordinated cut-overs that are comparable in quality to the ILECs' access to the same loops have prevented CLECs from efficiently deploying switches to provide service to customers served by voice-grade loops. *See id.* Accordingly, until entry barriers are removed – by elimination of use

[31] A CLEC must complete all of these actions even if it is fortunate enough to be able to connect a building to a pre-existing access point in an existing building ring.

restrictions and implementation of electronic loop provisioning – CLECs cannot self provide switching at costs comparable to ILECs to any customer, whether "old" or "new."

For these reasons, the ILECs possess a vast competitive advantage over CLECs in situations where the ILECs need only incrementally expand their existing networks to serve new developments. As discussed above, this is true for nearly all the developments in the broad category BellSouth terms New-Build, Multi-Premises Developments. Forbearance from the requirements of Section 251(c) would therefore kill competition for this large group of customers and result in charges that are not "just and reasonable." 47 U.S.C. § 160(a)(1).

2. ILECs and CLECs Do Not Stand On Equal Footing Even In True "Greenfield" Situations.

Even in true "greenfield" situations – *i.e.*, where new construction is required from the customers' premises to the switch – forbearance is not warranted. It is simply not the case, as BellSouth contends, that CLECs and ILECs are equal in the eyes of developers and owners of New-Build, Multi-Premises Developments. Accordingly, the playing field is not level even when the companies are competing to serve a massive new development that will require construction of *every* component of telecommunications infrastructure from scratch. Moreover, the ILECs' lower capital costs mean that in many cases CLECs will not be able to match their ability to serve economically new developments.

In AT&T's experience, many building owners and developers are resistant to permitting CLEC access to their facilities. *See* Giovannucci Decl. ¶¶ 39-45. The ILECs enjoy an established brand that makes it much more likely that a developer would chose an ILEC over a CLEC even if they provide comparable service at comparable price. *See* Memorandum Opinion and Order, *Application of Ameritech Mich. Pursuant to Section 271 of the Communications Act*

of 1934, As Amended to Provide In Region InterLATA Servs. in Mich., 12 FCC Rcd. 20543, ¶ 15 (1997) (ILECs enjoy a competitive advantage because of their "strong brand recognition"); *see also* Giovannucci Decl. ¶ 40. Moreover, many of the developers and building owners that will deal with a CLEC charge highly inflated monthly fees for access or impose special security restrictions on the CLEC's employees. *See id.* ¶ 41. The Commission cited several of these problems when concluding in the *Triennial Review Order* that CLECs "are impaired on a nationwide basis without access to unbundled subloops used to access customers in multiunit premises."[32] In particular, the Commission noted that CLECs often face a "refusal to allow installation of [its] own new wiring" on the premises.[33]

In fact, building owners have been remarkably candid with the Commission about their discriminatory treatment of CLECs. In comments filed during the building access proceedings, the Real Access Alliance, which represented "over one million individual building owners and managers," went out of its way to stress that its members have a strong incentive to discriminate:

> In the building access situation, however, it is the ILECs that have market power . . . . It is extremely risky, if not impossible, for a building owner to deny access to the ILEC, and *so the ILEC often gets favorable terms*. Competitors [CLECs], on the other hand, are subject to market forces and must negotiate with building owners on a level playing field.

---

[32] *Triennial Review Order*, ¶ 348 (footnote omitted).

[33] *Id.*

Further Comments of the Real Access Alliance, *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, at 41 (Jan. 22, 2001) (emphasis added).[34]

Given these realities, it is unsurprising that in AT&T's experience, developers almost never issue a request for proposals of the kind attached to BellSouth's Petition. *See* Giovannucci Decl. ¶ 42. Indeed, even BellSouth admits that such RFPs are "atypical." Petition at 3. What is much more common is for the developer to grant ILEC access as a matter of course and then refuse CLEC access altogether, or charge exorbitant rates for it. *See* Giovannucci Decl. ¶ 42.

Additionally, ILECs enjoy much lower capital costs due to their scale efficiencies and captive customer base. *See id.*, ¶¶ 35-38. Given this, there will be many instances where it will be economic for an ILEC to deploy new facilities, but where CLECs simply will not be able to do so. *See id.*, ¶ 38. Indeed, because of capital constraints, AT&T is unable to fund many potentially profitable local network constructions that it has identified. *See id.*, ¶¶ 35-36; *see also* FCC New Release, *FCC Chairman Michael Powell Appointed to President Bush's Corporate Fraud Task Force* (July 9, 2002) (quoting Chairman Powell as stating that there is "severe capital crisis [that is] putting a tremendous strain on the telecommunications industry").

---

[34] Ironically, despite this record of blatant discrimination by building owners and developers *against* CLECs, BellSouth complains that developers have entered into exclusive arrangements with CLECs to BellSouth's detriment. *See* Petition at 1. BellSouth fails to explain, however, how the forbearance relief it seeks in its Petition would change this situation. In any event, the Commission forbids carriers from entering into exclusive access arrangements with commercial premises owners. *See* Memorandum Opinion and Order, *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd. 22,983, ¶ 27 (2000). If BellSouth is aware of violations of this rule, its remedy would be to initiate an enforcement action, not seek forbearance from its own unbundling obligations. Likewise, BellSouth could urge the Commission to extend its prohibition on exclusive access arrangements to residential multi-tenant premises.

3. Given These Obstacles To Facilities-Based Competition, The Provisions of Section 251(c) Are Necessary To Ensure That Charges To Residents of New-Build, Multi-Premises Developments Are Just, Reasonable And Nondiscriminatory.

Given the daunting barriers to facilities-based competition, CLECs' only choice is to rely on the provisions of § 251(c) to give them cost-based access to ILECs' facilities, whether they are found in New-Build, Multi-Premises Developments or elsewhere.

Granting the relief BellSouth requests would allow ILECs to deny cost-based access to their facilities used to serve New-Build, Multi-Premises developments. As the Commission and the courts have recognized, the lodestone for setting "just, reasonable and nondiscriminatory" prices is cost.[35] More to the point, in the UNE context, Congress has specifically directed that *only* "cost-based" rates can satisfy the statutory requirement that charges be just, reasonable and nondiscriminatory. 47 U.S.C. § 252(d)(1). The Commission has specifically found, on an extensive evidentiary record, that the cost-based ratemaking standard that comports best with economic efficiency and is most likely to foster effective competition in local telephony is the forward-looking economic cost methodology known as TELRIC.[36] The United States Supreme Court specifically upheld these findings over the ILECs' challenge. *Verizon*, 535 U.S. at 516-17,

---

[35] *See Verizon*, 535 U.S. at 476-88 (describing evolution of cost-of-service ratemaking); *Farmers Union Cent. Exch., Inc.* v. *FERC*, 734 F.2d 1486, 1501-02 (D.C. Cir. 1984) (holding that costs are the starting point for determining "'just and reasonable'" rates). While "non-cost factors may legitimate a departure from a rigid cost-based approach," "'each deviation from cost-based pricing [must be] found not to be unreasonable and to be consistent with the Commission's [statutory] responsibility.'" *Id.* at 1502 (quoting *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 308 (1974)) (alterations in original). And charges that "permit exploitation, abuse, over-reaching or gouging are *by themselves* not 'just and reasonable.'" *Farmers Union*, 734 F.2d at 1502 (emphasis in original). *See also* 1 Alfred K. Kahn, *Economics of Regulation* 65 (1970) ("The central policy prescription of microeconomics is the equation of price and marginal cost.").

[36] First Report and Order, *Implementation of the Local Competition Provisions of the Telecomm. Act of* 1996, 11 FCC Rcd. 15499, ¶¶ 672, 685 (1996) ("*Local Competition Order*").

523.[37]

Section 251(c)(6), which requires ILECs to permit collocation of CLEC equipment on the premises of the ILECs, is a necessary complement to Section 251(c)(3). Even before the passage of the 1996 Telecommunications Act, the Commission recognized the importance of physical collocation, acknowledging that it "foster[s] increased competition in interstate access markets" and thereby is a mechanism to "increase customer options, reduce rates, and speed the introduction of new technologies."[38] And after passage of the Act, the Commission continued to find collocation necessary to "remove barriers to entry by potential competitors and speed the development of competition." *Local Competition Order*, ¶ 558. Finally, in the *Triennial Review Order*, the Commission noted that particularly for CLECs "that rely on the incumbent LEC's transmission facilities but not on unbundled local circuit switching, collocation of facilities in the incumbent's central office is essential to the provision of local service."[39]

Finally, Section 251(c)(4), which governs resale, provides an alternative means of gaining access to ILECs' equipment. That section provides "different opportunities, risks, and

---

[37] "Section 252(d)(1) provides that a state commission's determination of the just and reasonable rates for network elements must be nondiscriminatory, based on the cost of providing the network elements, and may include a reasonable profit. Pursuant to this statutory mandate, the Commission has determined that prices for UNEs must be based on the total element long run incremental cost (TELRIC) of providing those elements." Memorandum Opinion and Order, *Verizon Md. Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia*, 18 FCC Rcd. 5212, ¶ 39 (2003) (footnotes omitted). *See also* Memorandum Opinion and Order, *Application by BellSouth Corp., BellSouth Telecomms., Inc. and BellSouth Long Distance, Inc. for Authorization to Provide In-Region, InterLATA Servs. in Florida and Tennessee*, 17 FCC Rcd. 25828, ¶ 19 (2002).

[38] Memorandum Opinion and Order, *Expanded Interconnection With Local Tel. Co. Facilities*, 9 FCC Rcd. 5154, ¶¶ 1, 9 (1994).

[39] *Triennial Review Order*, ¶ 477.

costs in connection with entry into local telephone markets."[40] In particular, resale provides a means of competition when there is not "sufficient demand" in a market for potential competitors to "recoup their investments in unbundled elements" pursuant to Section 251(c)(3).[41]

Under BellSouth's proposal, CLECs would lose *all* of these means of competing for customers in New-Build, Multi-Premises Developments. Even if a CLEC could persuade the developer or owner to permit installation of its equipment to service customers, it would have no ability to actually complete calls to those customers without access to the ILEC's facilities. And without § 251(c)(3), (4), & (6), the CLEC will have no cost-effective means of gaining that access.

B. The Provisions of Section 251(c) Are Necessary For The Protection Of Consumers.

For the same reasons, BellSouth has also failed to show that continued application of Sections 251(c)(3), (4), and (6) to New-Build, Multi-Premises Developments is unnecessary for the protection of consumers.[42] In fact, just the opposite is true. For the reasons discussed previously, without the provisions of Section 251(c) that BellSouth seeks to avoid, there will be no meaningful competition for customers in these developments, inevitably leading to increased prices.

In fact, the Commission has previously held that the mere *potential* for rate increases that might occur as a result of forbearance from enforcing depreciation prescription rules is sufficient

---

[40] *Local Competition Order*, ¶ 331.

[41] *Id.*, ¶ 334.

to preclude the required finding under Section 10(a)(2) that continued enforcement was "not necessary for the protection of consumers":

> Forbearance of the depreciation prescription process could potentially trigger large increases in a carrier's depreciation expenses, which could in turn result in unwarranted increases in consumer rates. These increased depreciation expenses and consumer rates would [be] likely to continue for many years until robust competition curtails the ability of the incumbent LECs to secure these rates from consumers.

1998 Biennial Review Depreciation Requirements, ¶ 59 (footnote omitted). The forbearance that BellSouth now proposes would make rate increases a certainty, not just a possibility.

C. Abandoning Section 251(c)(3), (4), & (6) For Facilities Used to Service Residents of New-Build, Multi-Premises Developments Is Inconsistent With The Public Interest.

Finally, BellSouth's attempt to show that forbearance is in the public interest (Petition at 10) is little more than a reprise of its discredited investment incentive arguments, and should be rejected for the reasons explained above. Section 10(b) directs the Commission, in considering whether forbearance is "consistent with the public interest" under Section 10(a)(3), to consider whether forbearance will "promote competitive market conditions" and "enhance competition among providers of telecommunications services." As discussed above, the relief sought by BellSouth would have the very opposite effect.

Moreover, the Commission has specifically held that forbearance from enforcing cost-of-service price regulation must be denied under the third prong of Section 10(a) and 10(b) where "forbearance would be likely to raise prices for interconnection and UNEs, (particularly those that may constitute bottleneck facilities) inputs competitors must purchase from incumbent LECs

---

(. . . continued)

[42] 47 U.S.C. § 160(a)(2).

in order to provide competitive local exchange service." *1998 Biennial Review Depreciation Requirements*, ¶ 63. When "the result of forbearance would be higher costs for competitive LECs which could impair their ability to enter and compete in local markets," the Commission "cannot find that forbearance would promote competitive market conditions." *Id.* "Because the primary purpose of requiring incumbent LECs to provide interconnection and unbundled network elements is to stimulate competition in the provision of local exchange service, allowing ILECs to increase rates for those services . . . could adversely affect competition by raising input prices that competitors pay." *Id.* ¶ 68 (footnote omitted). Hence, "forbearance would not enhance but, rather, would likely retard competition." *Id.* BellSouth's Petition makes "raising prices for interconnection and UNEs" not just a likely side-effect of forbearance, but its very purpose. It has therefore failed to satisfy the requirements of Section 10(a)(3).

CONCLUSION

For the foregoing reasons, BellSouth's Petition for Forbearance should be denied.

/s/ Leonard J. Cali
Leonard J. Cali
Lawrence J. Lafaro
Stephen C. Garavito
AT&T Corp.
One AT&T Way
Bedminster, New Jersey 07921
(908) 532-1845

David Lawson
Paul J. Zidlicky
Joseph R. Palmore
Sidley Austin Brown & Wood LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000

Dated: November 10, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2003, I caused true and correct copies of the forgoing Opposition of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: November 10, 2003
Washington, D.C.

/s/ Peter M. Andros

Peter M. Andros

SERVICE LIST

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554[1]

Qualex International
Portals II
445 12th Street, SW, Room CY-B402
Washington, D.C. 20554

Jonathan B. Banks
L. Barbee Ponder IV
BellSouth Telecommunications, Inc.
1133 21st Street, NW, Suite 900
Washington, D.C. 20036-3351

[1] Filed electronically via ECFS

ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160(c) From Application of Sections 251 (c)(3), (4), and (6) In New-Build, Multi-Premises Developments	)	WC Docket No. 03-220

DECLARATION OF
ANTHONY J. GIOVANNUCCI
ON BEHALF OF AT&T CORP.

1. My name is Anthony J. Giovannucci. My business address is 429 Ridge Road, Dayton, New Jersey. I am a Division Manager with AT&T's Network Engineering and Operations ("NEO") organization, the entity within AT&T Corp. that, among other things, provides local service to AT&T Business customers. In my current position, I am responsible for a number of key areas of Outside Plant activity, including the development of an Outside Plant ("OSP") plan of record for capital deployment; negotiation and completion of agreements controlling rights-of-way ("ROW"), franchises and building right of entry. Additionally, I am responsible for the development and application of Standard Network Architecture Guidelines. Prior to my present position, I did contract work at various regional Bell companies and operations companies between 1987 and 1993; from 1993 to 1998, I worked at TCG, which was acquired by AT&T in 1998.

2. As a Division Manager in NEO, I am part of a larger team that is responsible for the efficient planning, engineering, delivery and management of local network capacity, assets, and associated information services. In general, this team ensures that NEO optimizes the use of its limited resources and controls expenses while meeting end-user customers' expectations and allowing for an appropriate return on the company's investment.

3. The purpose of this Declaration is to respond to BellSouth's Petition requesting the Commission to "forbear" from applying certain provisions of the Telecommunications Act of 1996 to the BellSouth facilities used exclusively to serve New-Build, Multi-Premises Developments ("MPDs") and to the services provided over such facilities to the end-users located in such developments.[1] BellSouth's request is based on the assumption that CLECs and ILECs are similarly situated when competing for customers in MPDs. For example, BellSouth contends that "all communications providers stand on equal footing when negotiating the installation of facilities and provision of services in these MPDs."[2]

4. BellSouth's assumption is wrong. Because BellSouth's request encompasses far more than true "greenfield" situations (in which previously vacant land becomes home to a new development large enough to support its own switch), ILECs such as BellSouth are uniquely situated to serve most of those customers simply through an incremental expansion of their existing networks. This gives them an enormous advantage over the CLECs, who do not have existing facilities of the same scope and traffic as the ILECs. The ILECs also have other significant advantages over CLECs in the provisioning of service to MPDs. For

[1] *See* BellSouth's Petition for Forbearance Under 47 U.S.C. § 160(c) in New-Build, Multi-Premises Developments ("Petition"), filed October 8, 2003.

[2] *Id.* at 3.

example, BellSouth already holds the rights-of-way required to construct any necessary facilities, while CLECs must delay construction until they acquire ROWs of their own from municipal authorities. CLECs also encounter greater difficulties than BellSouth in raising sufficient capital for construction of the facilities required to serve these customers. Finally, experience has shown that developers and building owners often refuse to provide access to CLECs or do so only on discriminatory terms that disfavor the CLECs. Thus, the CLECs do not stand on equal footing with BellSouth even in true "greenfield" situations.

I. THE NETWORK ARCHITECTURE OF BELLSOUTH AND OTHER ILECS GIVES THEM AN ENORMOUS ADVANTAGE OVER CLECS THAT ATTEMPT TO DEPLOY THEIR OWN NETWORKS.

5. If the Commission adopted BellSouth's proposal, BellSouth would have no obligation to provide CLECs with access to its facilities through unbundled network elements, resale, or collocation when competing for customers in New-Build, Multi-Premises Developments. To understand the impact of this proposal, and the advantages that the ILECs' position as historical monopolists gives them in the context of MPDs, it is useful to begin by explaining briefly how the ILECs deployed their ubiquitous networks, and how CLECs such as AT&T deploy their own networks as new entrants.

6. The ILECs deployed their local telephone networks as legally protected monopolists, and as such they were guaranteed the ability to serve all demand for telecommunications services for everyone, everywhere. The ILECs were also regulated under a regime that provided an authorized rate of return on all investment. Under these conditions, the ILECs were able to construct networks that not only addressed all current demand at low per-unit cost, but also potential demand far into the future.

7. Most of the cost of deploying transmission facilities is not in the conductor itself (whether copper or fiber), but in the supporting infrastructure – the trenching, poles, conduits, rights of way, and building access. As protected monopolists, the ILECs were guaranteed the ability to serve all demand, and therefore were able to construct an efficient and ubiquitous network consisting of high-capacity transport and loop feeder plant reaching every neighborhood and locale in an area. Because the ILECs were assured of serving all demand, they could spread the high fixed costs of deployment over virtually all customers, both large and small, and achieve very low per-unit costs.

8. In particular, the ILECs built their loop and transport plant to maximize these efficiencies. For example, in their loop plant, the ILECs built high-capacity feeder plant to connect their central offices with every neighborhood, and then built progressively lower capacity lines to connect these intermediate points to each customer's premises. As a result, whether the conductor used is copper or fiber, the ILECs already have feeder and distribution plant built to virtually every location in an exchange area, and can serve new customers or add new services merely by making incremental changes in existing loop plant. Indeed, even in a new build area (which is sometimes misleadingly called a "greenfield" build), with rare exceptions the ILEC can serve such locations merely by making incremental modifications to its existing plant. The same is true of transport. The ILECs already have ubiquitous fiber transport networks in place that connect all of their central offices, and in almost all circumstances they can add capacity to these networks merely by making relatively inexpensive upgrades to the attached electronics.

9. Moreover, as the ILECs deployed their local networks, they designed their infrastructure to accommodate not only existing demand, but demand well into the future.

Because the fixed costs of deploying all transmission facilities, including fiber (trenching, support structure, and laying cables) are extremely high, BellSouth and the other ILECs often have deployed extra capacity (both fiber and copper plant) in their networks that they know will eventually be used because of their substantial customer base. Further, as the sole providers of service, ILECs can justify the extension of facilities into areas of anticipated demand, often years before that demand actually materializes.

10. The deployment of excess fiber capacity in their networks results in substantial cost savings for the ILECs, because it is far less expensive to deploy such excess capacity during initial construction than to add it later. An ILEC can use its excess capacity to match any service that a CLEC wishes to provide by performing comparatively inexpensive upgrades to the electronics associated with existing facilities. Where dark fiber exists, adding "new" capacity requires only that optical terminating equipment be placed at each end of the facility. And even if no dark fiber exists, it is generally feasible to upgrade the existing terminal electronics to significantly increase the ILECs' capacity (for example, from an OC-3 to an OC-12 or OC-48).

11. As the sole providers of a utility service, ILECs also were granted comprehensive rights-of-way by local governments, often accompanied by the power of eminent domain, without the requirement to compensate the governmental entity. This enabled them to expand their networks as demand conditions warranted, without the need to obtain additional governmental approval.

12. The ILECs' ability to deploy their networks under these conditions has provided them with a enormous advantage over time. For virtually any customer a CLEC might

want to serve, the ILECs have *already* deployed transmission facilities to reach that location, and critically, they are *already* recovering the high fixed cost of those facilities spread over a base of a large number of customers. As demand increases, and the need for service over larger areas arises, the ILECs are thus able to add new services, capacity, or new customers by using existing facilities with relatively inexpensive, incremental additions (*i.e.*, in many cases simply by adding electronics to dark fiber or upgrading electronics on previously lit fiber).

13. In sharp contrast, a CLEC cannot rely on either guaranteed demand or a guaranteed return, and must build a competitive local network "from scratch." Therefore, an entirely different set of factors must underlie a CLEC's decision to build such a network. The most important is the specific demand for the CLEC's local services from specific customers in specific locations. Also crucial is the existence of favorable conditions for facility construction, including the ability to obtain rights-of-way and building access and the potential to partner with other carriers to share initial expenses. The CLEC must also consider the availability and price of wholesale facilities from the ILEC, because a CLEC generally cannot reach any end-user customer without access to at least some ILEC facilities.

14. CLECs such as AT&T would prefer to provide service to their customers entirely on their own networks, free from dependence on the facilities of the ILECs. However, the difficulty of justifying the cost of construction of such a network, along with a number of significant practical impairments, not only makes ubiquitous deployment impossible, but also severely limits the ability of AT&T or other CLECs to deploy a network that is sufficiently comprehensive to serve all but a small number of customers totally "on net."

15. The situation facing CLECs contrasts starkly with the conditions under which the ILECs built their networks. CLECs' network growth is tied directly to the number of customers served and the amount of traffic they generate (and thus their ability to cost justify the initial build – assuming that capital is available for the project). ILECs, however, were able to build their network with the assurance of serving 100 percent of the demand in any one area and with no concern for the availability of capital because of their assured rates of return. This fundamental difference requires a CLEC to develop its network from the core (*i.e.*, backbone and switch) outward to its nodes, and then ultimately, to the customers. ILECs, on the other hand, did not have to focus on obtaining the economies of scale needed to build loop plant. Instead, the ILECs merely had to design and build efficient loop plant reaching all end users, and then design the rest of its network to interface with its loops.

II. GRANTING BELLSOUTH'S PETITION WOULD PUT CLECS AT A SUBSTANTIAL COMPETITIVE DISADVANTAGE.

16. As previously stated, BellSouth's proposal would relieve BellSouth of any obligation to give CLECs access to its transmission facilities through unbundled network elements, resale, or collocation when competing for customers in New-Build, Multi-Premises Developments. This would give BellSouth a virtually insurmountable advantage in competing for customers in many MPDs, because the CLECs would have no ability to actually complete calls to those customers without access to the ILECs' transmission facilities.

17. At the outset, it is important to emphasize that although at times BellSouth's Petition appears to focus on true "greenfield" situations – *i.e.*, where an entire plant, including a switch, must be built from scratch to serve a new development built on previously

vacant land – its request for "forbearance" is far broader in scope. BellSouth's Petition, however, defines MPDs very differently as follows:

> By New-Build, Multi-Premise Developments, BellSouth means newly constructed, multi-subscriber properties, including single-family home subdivisions, Multiple Dwelling Unit (MDU) residential properties, and multiunit premises as defined at 47 C.F.R. § 68.105(b), including multi-tenant commercial buildings, mixed use developments, malls, industrial parks and other similar developments where the improvements, including the telecommunications infrastructure, will be new construction. New-Build, Multi-Premise Developments also includes re-developments of existing properties that are undergoing total rehabilitation where the communications facilities and infrastructure are being replaced entirely.[3]

18. This definition is broad enough to include, for example, existing neighborhoods where older homes are being demolished to be replaced with new ones, or where a small new development is being built in the middle of the existing neighborhood.[4] BellSouth itself acknowledges that its definition would encompass the "majority" of "the 490,000 new housing starts within BellSouth's 9-state region during 2003."[5] Clearly, only a small fraction of these 245,000 or more "new housing starts" are true "greenfield" situations.

19. When providing service to the massive majority of customers who are *not* true "greenfield" developments, BellSouth would have a substantial competitive advantage over CLECs simply by virtue of its already-existing ubiquitous network, if it was not required to grant access to its transmission facilities to the CLECs. Because it has already deployed an entire

---

[3] Petition at 2.

[4] Thus, the definition would include a "development" consisting entirely of two houses with new "telecommunications infrastructure," such an incremental addition to a loop already serving the neighbors of the new houses.

[5] Petition at 2.

transport plant to the areas where these customers will be served, BellSouth would be required (at most) to build only a simple extension of its existing network – in contrast to the CLECs, which would be required to construct their own loop plant from scratch. Even in those relatively rare situations when BellSouth must deploy entirely new facilities to extend service to a development, BellSouth has several competitive advantages that will enable it to provide service more expeditiously, and at less cost, than the CLECs.

A. For BellSouth, Unlike CLECs, Serving Customers in Most MPDs Would Require – At Most – a Relatively Simple Extension of Its Existing, Ubiquitous Network.

20. Because of their ubiquitous local networks, ILECs such as BellSouth are required to make only incremental extensions to serve most of the MPDs discussed in its Petition. Except in rare true "greenfield" situations, the loop plant extended to the "new" builds will tie back into the ILEC's existing distribution network or, in the case of larger developments, into existing feeder networks.[6] Calls then will be carried over common facilities that transport the existing, enormous demand of the ILECs, including BellSouth. The high volume of this traffic enables BellSouth and other ILECs to reduce their average costs of service, thus achieving economies of scale.

21. In many instances, the ILEC's ability to incrementally expand its existing network to serve "new" developments is materially furthered by its previous deployment of dark fiber. For example, because the ILECs have built their fiber loops with substantial excess capacity, the availability of the excess dark fiber enables an ILEC to add "new" capacity simply

[6] Even in true "greenfield" deployments, the ILEC would have a substantial advantage over the CLEC, because the ILEC's ownership of existing rights-of-way, greater accessibility to capitals and greater access to the MDUs would enable it to construct the necessary facilities more expeditiously. *See* Part II-B, *infra.*

by placing optical terminating equipment at each end of the facility. As a result, the cost and time of any necessary construction is minimal for the ILEC, as compared to the cost of new construction.

22. A CLEC, by contrast, faces a vastly more complex and expensive task to extend service to a development. Because it cannot rely on the ILEC's existing facilities, rights-of-way, or conduit, a CLEC would always be required to build the loop "from scratch." This task will be expensive and time-consuming – and will be complicated by the months of pre-construction efforts required to negotiate and secure the necessary rights-of-way, construction permits, and authorization of access by the building landlord.[7] By itself, this difference gives the ILECs enormous cost and time advantages. Obviously, it is far less expensive and time-consuming to build an extension using preexisting loops and transport previously laid than by starting "with nothing."

23. The foregoing discussion assumes that a CLEC has in place a switch capable of serving the customers to which the CLEC wishes to provide service. If it does not, the CLEC would need to deploy a switch, which would be extremely costly and cause substantial delays in providing service to the customer. Many developers of subdivisions are unlikely to take the chance that the switch can be deployed and connected to the loops in time, particularly when there is an established alternative – the ILEC – that can provide service almost immediately.

[7] A CLEC must complete each of these actions even if it is able to connect a building to a pre-existing access point in an existing building ring (which the CLEC may not be able to do in many cases).

24. In addition, only a handful of developments generate sufficient traffic to independently justify the development of their own switch. Thus, in order to achieve switching costs comparable to those of an ILEC such as BellSouth, the CLEC must be able not only to serve the development, but also surrounding areas. But CLECs have been prevented from efficiently deploying switches to provide service to customers served by voice grade loops, due to limitations on loop-transport combinations and NGDLC loops and the CLECs' inability to obtain coordinated cut-overs that are comparable in quality to the ILECs' status to the same loops. Until such entry barriers are removed (for example, by elimination of use restrictions and implementation of electronic loop provisioning), CLECs cannot provide their own switches at costs comparable to ILECs to any customer, whether "old" or "new."

25. Under these circumstances, CLECS are at a vast competitive disadvantage. BellSouth would only need to make an incremental expansion of its existing network to provide service to most of the new developments, since it already has in place an entire transport plant anterior to the necessary incremental addition. If BellSouth were permitted to deny CLECs access to the facilities that it uses to serve MPDs, and CLECs were thus requested to build their own loop plant, CLECs would effectively be precluded from serving most, if not all, of this large group of customers.

B. CLECs Would Face Other Significant Impairments If They Were Required To Provide Service To MPDs Exclusively Through Their Own Facilities.

26. Even leaving aside the advantages that BellSouth enjoys in serving New-Build, Multi-Premises Developments due to the existence of its ubiquitous network, CLECs would be at a serious disadvantage in other respects if they were required to serve these developments without having access to BellSouth's facilities. These disadvantages include: (1)

the need for the CLECs to negotiate the necessary rights-of-way with the local municipality where the CLEC seeks to provide service; (2) the difficulty of raising capital to fund the network construction that would be required; and (3) the resistance of many building owners and developers to CLEC requests for access to their buildings. Each of these disadvantages would exist even in true "greenfield" situations where the serving carrier (BellSouth or a CLEC) is required to deploy a new switch along with loops.

27. **Rights-of-Way.** BellSouth and the other ILECs have a distinct competitive advantage over the CLECs due to their existing ownership of rights-of-way, which they obtained long ago. On the other hand, because a CLEC cannot begin construction of its facilities until it successfully negotiates a right-of-way agreement with the local municipality where the CLEC seeks to provide service, the CLEC cannot construct its facilities as expeditiously as BellSouth, which already has the rights-of-way that it needs to proceed with construction.

28. When negotiating with CLECs, municipalities often demand exorbitant fees and other onerous conditions. Although a typical franchise agreement may take between four and six months to negotiate, AT&T has franchise negotiations (and accompanying litigation) that remain unresolved after several years. Furthermore, even after a franchise agreement has been negotiated, a municipality's ratification process can add as much as 60-90 days before construction can begin. These types of problems are not isolated incidents; AT&T has experienced such delays and additional costs across the country.

29. Although Section 253(c) of the Act allows municipalities to be compensated for the costs they incur as a result of managing the use of public rights-of-way by

telecommunications providers, both the federal law, and in many cases state law, prohibit municipalities and other governmental entities from actually profiting from rights-of-way fees. In spite of this clear prohibition, AT&T often encounters blatant examples of municipalities over-reaching in establishing franchise-type fees.[8]

30. The imposition of other extraneous and burdensome regulations are also often included in connection with government entities' granting of a franchise. Despite decisions of this Commission and the courts delineating precisely what falls within the rubric of rights-of-way management and what does not, many local authorities continue to require compliance with regulations that are unrelated to the management of rights-of-way, but instead seek to control other carrier operations. Additionally, an unreasonable length of time is typically required before a municipality grants access to rights-of-way.

31. Because of the delays that they incur in negotiating ROWs, CLECs are not able to begin construction of loops as quickly as BellSouth, which already has the necessary ROWs. This puts CLECs at a serious competitive disadvantage, because the ability to provide service to a customer promptly after a customer has requested it is critical to a CLEC's ability to attract a sufficient customer base. Business customers, for example, typically seek service in time frames measured in days or weeks, because they need the new services or added capacity in order to address immediate business needs. Many of these customers are not willing to agree to take service from a CLEC and then wait for months before the necessary ROWs are obtained and

[8] The terms "franchise" and "right of way" are often used interchangeably to describe the permission needed to actually construct telephone facilities. However, the permission a LEC seeks from the municipality is the ability to access rights of way within the municipality to build. The "franchise," or actual right to provide telecommunications service, is granted by the state commission.

construction is completed. Thus, although a customer might prefer to use a CLEC as its service provider, its need for immediate service will trump that preference BellSouth can provide the service at an earlier time.

32. The delays caused by the need to obtain the necessary ROWs also make it more difficult for the CLEC to justify the large expenditures of capital required for construction of the loop plant needed to serve particular MPDs. Even if there is potentially sufficient demand to support construction of a new loop facility, it is extremely difficult for a CLEC to know whether such demand will actually materialize before it has facilities in place. The timing in such cases is essential, given the desire of customers for their service to begin immediately. Yet, given the delays involved in the process of seeking ROWs, customers are less likely to retain a CLEC as their carrier – and without a customer base, the CLEC lacks the ability to offset the sizeable fixed costs of such construction.

33. To avoid the delays caused by negotiations for rights-of-way, CLECs have three choices: they can accept these burdensome and discriminatory conditions; use the existing facilities of the ILEC, with which the CLEC is in competition; or forego competing to provide service to customers. Obviously, none of these alternatives puts a CLEC in a practical position to enter into facilities-based competition with the ILEC.[9]

34. Even when negotiations for rights-of-way are successfully completed, the construction process is further delayed by the CLECs' need to negotiate additional agreements

[9]The final option open to AT&T or another CLEC is to simply anticipate the delays and build facilities well in advance of customer needs, much the same way the ILECs originally built their networks. Unfortunately, the realities of the market, including the CLECs' current inability to obtain capital, demonstrate that this "build it and they will come" option is simply the road to insolvency.

with other parties, including the ILEC, and to comply with the requirements of the laws of certain municipalities. For example, a CLEC may need to negotiate agreements with other parties to address the use of existing rights-of-way capacity or the development of new right-of-way capacity on the CLEC's desired route. In addition, many municipalities have specific provisions requiring carriers to build facilities jointly (*e.g.*, coordination of street digging), and some municipalities have placed restrictions or moratoria on new construction. All of these requirements add complexity, cost, delay and uncertainty to any attempt to obtain a permit and initiate construction.[10]

35. **Capital Constraints.** Even if a CLEC can otherwise justify construction of the facilities necessary to serve particular MPDs, such construction may be prevented by capital constraints. New construction requires significant up-front capital investment and, as a result, the CLEC must obtain a source of funds for the project. The decision to invest capital in new construction is based on fairly simple business case principles. AT&T balances the amount of money needed for the construction, the availability of capital, the average payback time on the capital, the maximum contributions that such construction will have on the success of a variety of products and services of the company, and the potential risks and returns of other projects competing for the same limited construction dollars. As part of the business case, AT&T considers its existing facilities, including LSO collocations, and how new construction will

[10] Even in circumstances in which these provisions are presently applied equally to all carriers, BellSouth is likely to have obtained its franchise and accompanying benefits prior to the imposition of the current requirements. This often leads to situations where municipalities seek significant payments or benefits from the CLECs that were not originally imposed on BellSouth (*e.g.*, to have part of the CLEC's network assigned to the municipality). Further, it is not uncommon for municipal ordinances to allow existing providers, *i.e.*, BellSouth, to be "grandfathered."

maximize the usage of those facilities. AT&T then must balance these factors against both the customer's willingness to wait for facilities, and the willingness of a customer to enter into a term contract sufficient to meet AT&T's cost recovery guidelines.

36. But a sufficient pool of capital is often difficult to obtain, particularly at rates that would conform to prudent business practices. A proposed construction project must have higher potential returns (lower payback periods) and/or lower risk (uncertainty) of cost savings should access prices drop compared to other projects competing for today's exceedingly scarce capital. In AT&T's experience, the planned local construction program has always exceeded the available capital.[11]

37. The economic decline since 2001, particularly in the telecommunications industry, has also radically changed both the availability and cost of capital. In the past, both the capital markets and vendors served as ready sources of capital. However, the downturn in the economy, coupled with the now almost routine failures of CLECs, have made investors wary, generating what has been aptly called a "capital crisis" in the industry.[12]

38. ILECs such as BellSouth are not subject to the same capital constraints as the CLECs, because the ILECs enjoy much lower capital costs due to their scale efficiencies and captive customer base. As a result, in many instances it will be economic for BellSouth to

[11] Even in circumstances where the economic threshold for self-supply is met, there are factors that preclude construction. For example, in some instances, the ILEC is providing service under term or volume discount arrangements that include substantial termination penalties that make switching to a CLEC prohibitively expensive. In other instances, AT&T is unable to use its own facilities because of limited collocation space or collocation equipment capacity.

[12] FCC News Release, *FCC Chairman Michael Powell Appointed to President Bush's Corporate Fraud Task Force* (July 9, 2002).

deploy new facilities to serve MPDs, but not for a CLEC to do so. This disparity, by itself, means that in many cases the CLECs will be unable to match BellSouth's ability to economically serve new developments.

39. **Resistance of Building Owners and Developers To Giving CLECs Access To Their Facilities.** Even assuming that the CLEC acquires the necessary rights-of-way from governmental authorities and can raise sufficient capital to finance construction, it cannot begin construction unless and until the building owner or developer permits the CLEC access to its facilities. Obtaining such permission, however, often is very difficult or even impossible. As a result, CLECs cannot serve the same number of MPDs as BellSouth under the same conditions of access that BellSouth enjoys.

40. In AT&T's experience, many building owners and developers are reluctant to allow CLECs access to their facilities. Because they are more familiar with the ILEC due to the ILEC's established brand name and long history of providing telecommunications service to the general vicinity, a developer or building owner is more likely to choose an ILEC over a CLEC even if the CLEC provides comparable service at a comparable price.[13] Thus, in many cases when AT&T has requested access to a particular building or neighborhood, its requests have been resisted – or even rejected – by the owner or developer.

[13] In the case of a Multi-Dwelling Unit ("MDU"), the building owner might give the CLECs only limited access, while giving the ILEC an unrestricted opportunity to serve all of the end-users in the building. For example, due to the urgency of service delivery, it may be impractical or impossible for a CLEC to negotiate access to the entire building with the owner or landlord at that time. In such cases, the landlord will permit the CLEC to establish only a "fiber-to-the floor" arrangement, which allows the CLEC to establish a connection to serve a single customer in the building, but not to other tenants. If the CLEC wishes to serve more customers in the building or otherwise obtain greater access, it must engage in additional negotiations with the landlord or building owner – who is free to deny such access. This is not a rare occurrence for

41. Furthermore, even when building owners or developers agree to negotiate access with a CLEC, they often insist on terms that are so unreasonable that it becomes uneconomic or impractical for the CLEC to proceed to provide service. For example, many developers and building owners demand highly inflated monthly fees for access, impose special security restrictions on CLEC employees, or require CLECs to agree to discriminatory indemnification provisions.

42. In its Petition, BellSouth asserts that "all communications providers stand on equal footing when negotiating the installation of facilities and provision of services in these MPDs."[14] That is simply not the case. Building owners and developers all too often grant an ILEC's request for access as a matter of course and then either deny a CLEC's request for access altogether or grant access only if the CLEC agrees to unreasonable conditions (such as the payment of exorbitant fees). In AT&T's experience, owners and developers almost never issue a formal request for proposals ("RFP") of the type that BellSouth attaches to its Petition.[15] Even BellSouth agrees that "the issuance of formal RFPs is atypical."[16]

43. In contrast to the "atypical" RFP cited by BellSouth, AT&T's experience illustrates the real-world impediments experienced by CLECs due to the reluctance of developers and building owners to grant them access to buildings or developments. Since last year, AT&T has more carefully tracked what AT&T has labeled "breakage," *i.e.*, situations where AT&T has

---

CLECs.

[14] Petition at 3.

[15] *Id.* at 3 & Exh. A.

[16] *Id.* at 3.

facilities to the "curb," but cannot rely entirely on its own facilities to provide the connection from AT&T's network to the potential customer because AT&T cannot obtain access to a particular building. AT&T has documented that it has lost the opportunity to provide such facilities-based service to a significant number of potential customers.

44. AT&T's examination of "breakage" confirms the difficulties that CLECs must surmount in order to gain building access. Among the problems AT&T has encountered are building owners who will not return AT&T's calls, regardless of the level of persistence applied; building owners who are only willing to provide access in exchange for AT&T's agreement to unreasonable terms, including highly inflated monthly fees for placing AT&T facilities in a building; and new concerns of building owners, fueled by the events of September 11, 2001, about providing building access to CLECs and their employees.[17]

45. If AT&T cannot build its own loop facilities, its preference is to use third-party providers instead of ILECs wherever possible. With respect to loop facilities to individual buildings, however, it should come as no surprise that alternatives to the ILEC are rarely available. AT&T estimates that there are more than 3 million buildings or business locations nationwide. In stark contrast, AT&T has been able to provide direct (*i.e.*, non-ILEC) access to slightly more than 6,000 buildings. Moreover, where AT&T has built its own facilities into a building, in the vast majority of cases AT&T will not be in a position to use its own facilities to serve all customers in the building that seek service from AT&T. The bottom line is that AT&T reaches only a fraction of a percent of all commercial buildings using non-ILEC facilities and, of

[17] In particular, AT&T has found that many building owners, acting on the advice of security consultants, have decided not to allow additional carriers who might need access to the most vulnerable locations in their buildings, especially rooftops.

those, only a minority are a configuration that provide unrestricted building access using AT&T's own facilities. Given that BellSouth has access to virtually all buildings in its region right now, CLECs clearly do not "stand on equal footing" with BellSouth.

CONCLUSION

BellSouth's suggestion that it enjoys no advantage in serving New-Build, Multi-Premises Developments is contrary to the facts. In nearly all of the "new" builds encompassed by its Petition, BellSouth would be required to make only an incremental extension of its existing network in order to provide service. By contrast, the CLECs, which do not have networks of such scope and demand, would be required to construct the loop (and a switch, if no switch is currently in place) from scratch , incurring substantial costs and delays that BellSouth does not experience. In *all* "new build" cases, the CLECs would be at a considerable competitive cost and time disadvantage, due to their need to obtain the necessary rights-of-way (which BellSouth already has) and their greater difficulty in obtaining both the capital and the authorization of access from the developer or building owner that would be required before they could construct the facilities needed to provide service. In view of these disparities between BellSouth and the CLECs, the denial of access to BellSouth's transmission facilities would effectively foreclose effective competition in the provision of service to MPDs in the BellSouth region.

VERIFICATION PAGE

I hereby declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Anthony J. Giovannucci

Dated: November 10, 2003